Nos. 18-422, 18-726

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,

Appellants,

—v.—

COMMON CAUSE, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

LINDA H. LAMONE, ET AL.,

Appellants,

—v.—

O. JOHN BENISEK, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION, ACLU OF NORTH CAROLINA, AND ACLU OF MARYLAND, IN SUPPORT OF APPELLEES

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OTHER AUTHORITIES

The Records of the Federal Convention of 1787
(Max Farrand ed. 1911) 9

Elliot's Debates (James McClellan & M.E.
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John Hart Ely, *Democracy and Distrust* (1980) 21

Jowei Chen & Jonathan Rodden, *Cutting
Through the Thicket: Redistricting
Simulations and the Detection of Partisan
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Wendy K. Tam Cho & Yan Y. Liu, *Toward a Talismanic Redistricting Tool: A Computational Method for Identifying Extreme Redistricting Plans*, 15 Election L.J. 351, 360, 362-64 (2016) 27

INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, non-partisan organization with more than 1.7 million members dedicated to the principles of liberty and equality enshrined in the Constitution. In support of those principles, the ACLU has appeared before this Court in numerous cases involving electoral democracy, including *Reynolds v. Sims*, 377 U.S. 533 (1964). The ACLU of Maryland, ACLU of North Carolina, and New York Civil Liberties Union are ACLU statewide affiliates of the national ACLU. The ACLU of Maryland and ACLU of North Carolina have approximately 42,000 and 30,000 members, respectively. The New York Civil Liberties Union has 170,000 members.

SUMMARY OF ARGUMENT

A fundamental precept of representative democracy is that the government must regulate the electoral process in an even-handed manner. Plainly, a state that barred members of one political party from voting in an election would violate this principle. So too would a state that manipulated voting machines to discount the votes cast for one party by one-third. Nor could a legislature wait until ballots were cast and *then* draw district lines to achieve its preferred electoral outcome. In each

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[1] All parties to the cases have lodged blanket consents for the filing of amicus briefs. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons or entities, other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

instance, the state's conduct would corrupt the integrity of the electoral process and impair voters' political rights.

Partisan gerrymandering is similarly incompatible with democratic principles. It subverts government's obligation to remain neutral in regulating elections. Although this Court has yet to agree on a standard to discern its limits, there is longstanding consensus that the practice lies beyond the constitutional pale.

The First Amendment requires that government officials neutrally regulate speech or expressive conduct in public forums. That neutrality principle—in the form of a prohibition against content and viewpoint discrimination—is rooted in the commitment to ideological competition as a critical component of self-government. The obligation of state neutrality under the First Amendment supplies a sufficient framework to bar a state from "burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring).

Partisan gerrymandering violates the First Amendment where the state draws districts with the purpose and effect of entrenching—or "freezing"—partisan advantage against likely changes in voter preferences. To make out a prima facie claim, a plaintiff must show: (1) an improper legislative *intent* to entrench a partisan advantage; and (2) an impermissible *effect* of having drawn the district lines in such fashion as to insulate partisan advantage against likely changes in voter preference.

In past cases, showing intent to entrench has not been a doctrinal stumbling block. The desire to squeeze out every last iota of partisan advantage has often been explicit. The difficulty lies in the second part of the proof: how much partisan gain is too much and how is this to be established? This has been the doctrinal stumbling block until now.

What has changed over time is that courts in multiple cases have used familiar evidentiary tools to determine whether a challenged plan so deviates from neutral allocations of electoral opportunity as to entrench incumbent advantage. The courts have looked to a range of validated social science evidence to make this assessment, just as courts do in many other areas of law. There is not one way of proving entrenchment, just as there is not one way of proving disparate effect in a discrimination case or unfair competition in an antitrust action. But the courts have been able to assess multiple empirical tests to identify districts that are such outliers, and so freeze the political process, that they presumptively violate the First Amendment. Once these two elements are met, the burden should shift to the state to demonstrate the legitimacy of the governmental interests justifying the apparent political distortions.

In both cases on review, the courts properly applied the dual threshold inquiry and then found the government's asserted purpose insufficient to overcome the First Amendment command of neutrality. The record evidence showed that Maryland and North Carolina legislators acted with intent to lock in their preferred partisan advantage, and that they accomplished that goal by entrenching

the majority party against the range of likely changes in constituent preference.

ARGUMENT

I. THE STATE MUST REMAIN POLITICALLY VIEWPOINT-NEUTRAL IN ADMINISTERING ELECTIONS.

State officials cannot tailor electoral rules to insulate their majority from changes in voter preferences without violating the First Amendment. That constitutional provision protects the panoply of rights of political expression, including the rights to associate to advance political beliefs, to participate in the electoral process, and to cast a meaningful ballot. *Anderson v. Celebrezze*, 460 U.S. 780, 787-89 (1983); *see also N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 210 (2008) (Kennedy, J., concurring). It prohibits the government from using its regulatory authority to skew the "marketplace of ideas." This "neutrality principle" underpins democratic self-government, which depends on free and fair electoral contests. As the Court has observed, "the core principle of republican government [is] that the voters should choose their representatives, not the other way around." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015).

A. The Neutrality Principle Operates as the Principal First Amendment Mechanism to Secure our System of Free Expression.

Justice Holmes famously wrote "that the best test of truth is the power of the thought to get itself

accepted in the competition of the market ...." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). That "theory of our Constitution," *id.*, is now a cornerstone of the First Amendment. *See, e.g., Sorrell v. IMS Health Inc.*, 564 U.S. 552, 583 (2011) (Breyer, J., dissenting); *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969).

Government neutrality regarding the regulation of speech is the doctrinal prerequisite to fair ideological competition. In its early application, the principle—which often takes the form of a prohibition against content discrimination—was most commonly invoked where the state policed expressive access to a public forum. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972); *see also, e.g., Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). In *Mosley*, for example, the Court invalidated a Chicago ordinance that selectively granted access to picket on public sidewalks based on speech content and the speakers' labor union affiliation. The Court explained that the First Amendment and the Fourteenth Amendment's equal protection guarantee prohibited the government from "grant[ing] the use of a forum to people whose views it finds acceptable, but deny[ing] use to those wishing to express less favored or more controversial views." *Mosley*, 408 U.S. at 96.

This Court has long "rejected government efforts to increase the speech of some at the expense of others." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 741 (2011). The core principle is that the state may not burden speech based on the viewpoint expressed without offending the First Amendment. No less neutrality is tolerable

when the government regulates the electoral system. The norms that preserve robust discourse in public forums would do little if the First Amendment did not similarly protect the electoral forum. More than a means of choosing officeholders, elections are the quintessential locus for competition in the political marketplace of ideas. *See McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 203 (2014).

B. The Neutrality Principle Applies to Regulation of the Electoral Process.

The guarantee of government neutrality that undergirds the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office," and, generally, to the regulation of the electoral process. *McCutcheon*, 572 U.S. at 191-92 (citation and internal quotation marks omitted). Thus, while states have broad discretion to regulate elections, they must "observe the limits established by the First Amendment." *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989). This Court has been vigilant about ensuring that laws governing the electoral process comply with the neutrality principle. *See McCutcheon*, 572 U.S. at 191-94; *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 415-16 (2006) (*LULAC*); *Anderson*, 460 U.S. at 788.

For example, this Court has applied careful scrutiny to ensure that, among other regulations,

voter qualifications,[2] regulation of candidates' and parties' access to the ballot,[3] campaign finance regulations,[4] and polling place rules[5] all adhere to constitutional obligations of neutrality. Each of these laws "inevitably affects—at least to some degree—the individual's right to vote and ... to associate with others for political ends." *Anderson*, 460 U.S. at 788. This Court must continue to ensure that states exercise their authority to regulate elections "fair[ly] and honest[ly]," *Eu*, 489 U.S. at 231, with "the aim of providing a just framework within which diverse political groups in our society may fairly compete," *Hunter v. Erickson*, 393 U.S. 385, 393 (1969) (Harlan, J., concurring).

There are sound reasons for this Court's insistence on neutrality in the electoral forum. "Confidence in the integrity of ... electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). It "encourages citizen participation in

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[2] *See, e.g., Carrington v. Rash*, 380 U.S. 89, 94, 96-97 (1965) (invalidating Texas law prohibiting servicemembers from voting while on active duty service in the state).

[3] *See, e.g., Williams v. Rhodes*, 393 U.S. 23, 24-25, 32 (1968) (invalidating Ohio ballot access restriction that "favor[ed] two particular parties—the Republicans and the Democrats—and ... g[a]ve them a complete monopoly ... on the right to have people vote for or against them").

[4] *See, e.g., First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978) (invalidating statute prohibiting banks and business corporations from engaging in certain campaign speech in referendum elections).

[5] *See, e.g., Burson v. Freeman*, 504 U.S. 191 (1992) (upholding viewpoint-neutral restriction on electioneering within 100-feet of polling place).

the democratic process." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008). Conversely, nothing can damage voter confidence as fully as watching the state entrench its preferred candidates or parties in office against the will of "an 'informed, civically militant electorate' and 'an aroused popular conscience.'" *Baker v. Carr*, 369 U.S. 186, 259 (1962) (Clark, J., concurring). By ensconcing the preferred party in office and "freez[ing] the political status quo," *Jenness v. Fortson*, 403 U.S. 431, 438 (1971), partisan gerrymandering undermines the "responsiveness [that] is key to the very concept of self-government through elected officials," *McCutcheon*, 572 U.S. at 227, and substantially burdens representational rights protected by the First Amendment.

C. Application of the Neutrality Principle in Regulating Redistricting is Consistent With Core Concerns of the Framers.

State neutrality in regulating the redistricting process is consistent with core principles embraced at the founding. Under the Articles of Confederation, state legislatures both appointed delegates to the Continental Congress and "enjoyed the power to establish qualifications." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 851 n.3 (1995) (Thomas, J., dissenting). The framers rejected that approach. "[I]n perhaps their most important contribution, [they] conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by the States, but by the people." *Id.* at 821. That ideal was "most clearly" implemented in the election of

members of the House of Representatives, *id.*, and later expanded to the Senate through the Seventeenth Amendment.

By design and from the outset, the Constitution delegated to the states powers limited to regulating the "Times, Places and Manner of holding [congressional] Elections." U.S. Const., art. I, § 4, cl. 1; *see Cook v. Gralike*, 531 U.S. 510, 522-23 (2001) ("No other constitutional provision gives the State authority over congressional elections, and no such authority could be reserved under the Tenth Amendment."). That choice reflected fears that greater involvement from state legislatures would temper the federal government's accountability to the electorate.[6] Nothing in the limited "procedural regulations" the framers saw fit to delegate to the states includes "a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade ... constitutional restraints." *Cook*, 531

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[6] *See* Elliot's Debates, at 75 (James McClellan & M.E. Bradford eds. 1989) (Madison: "considered an election of one branch ... by the people immediately, as a clear principle of free government [which] had the additional advantage of ... avoiding too great an agency of the state governments in the general one"); 1 The Records of the Federal Convention of 1787, at 50 (Max Farrand ed. 1911) (Wilson: argued "interference between the general and local Governm[enta] should be obviated as much as possible"); *id.* (Madison: "thought ... that the great fabric to be raised would be more stable and durable if it should rest on the ... people themselves, than if it should stand merely on the pillars of the Legislatures"); *id.* at 359 (Rufus King: argued "the Legislatures [would] constantly choose men subservient to their own views as contrasted to the general interest"); *id.* at 358-59 (Hamilton: argued allowing state legislatures to choose members of House of Representatives "would increase that State influence which could not be too watchfully guarded ag[ain]st").

U.S. at 523 (quotation marks omitted). Yet that is precisely what partisan gerrymandering does.

The founders also understood that "[t]he first instinct of power is the retention of power." *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 263 (2003) (Scalia, J., concurring in part and dissenting in part). They feared the "principal danger ... [of] the possibility that the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office." *Stanson v. Mott*, 551 P.2d 1, 9 (Cal. 1976) (citing Federalist Nos. 52, 53; 10 J. Richardson, Messages and Papers of the Presidents 98-99 (1899) (Jefferson)). As members of the Court have recognized, that "unfortunate" possibility is now reality. *Vieth*, 541 U.S. at 317 (Kennedy, J., concurring). "Whether spoken with concern or pride ... our legislators have reached the point of declaring that, when it comes to apportionment: 'We are in the business of rigging elections.'" *Id.* (citation omitted). Judicial intervention is essential to restore the First Amendment's commitment to democratic self-government.

II. PARTISAN GERRYMANDERING THAT ENTRENCHES THE STATE'S PREFERRED PARTY IN OFFICE SUBSTANTIALLY BURDENS FUNDAMENTAL POLITICAL RIGHTS AND TRIGGERS HEIGHTENED SCRUTINY.

The First Amendment safeguards voters' freedoms to associate with and advocate for a political party, vote for their candidate of choice, express their political views, and participate in the

political process. *See McCutcheon*, 572 U.S. at 191; *Anderson*, 460 U.S. at 787, 793-94. Those rights are "core ... activities" without which a representative democracy cannot function. *Elrod v. Burns*, 427 U.S. 347, 356 (1976).

Cognizant that laws regulating the electoral process "will invariably impose *some* burden upon individual voters," this Court has expounded a flexible standard to assess "reasonable, *nondiscriminatory* restrictions" on those core activities. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (emphasis added and citation omitted). Courts "must first consider the character and magnitude of the asserted injury to the [protected] rights ... that the plaintiff seeks to vindicate." *Anderson*, 460 U.S. at 789; *Burdick*, 504 at 434. The injury (or burden) is then balanced against the state's justification, *id.*, which must be "sufficiently weighty to justify" the burden imposed. *Norman v. Reed*, 502 U.S. 279, 288-89 (1992).

Where, as here, there is a threshold showing that the state has departed from neutrality to penalize citizens because of their political views and associations, the state's regulation must be necessary to meet important interests. *See Anderson*, 460 U.S. at 806; *Cal. Democratic Party v. Jones*, 530 U.S. 567, 581-82 (2000); *Norman*, 502 U.S. at 288-89.

Purposeful efforts to entrench a favored party or candidate against shifts in the electorate cannot be subject to the "sliding scale" delineated in *Anderson* and *Burdick*. Partisan gerrymandering gravely undermines "the premise of individual dignity and choice upon which our political system rests." *McCutcheon*, 572 U.S. at 203 (citation and

internal quotation marks omitted). Such targeted state intervention is anathema to the foundational precept that the "[g]overnment is forbidden to assume the task of ultimate judgment" on "conflicting arguments," "lest the people lose their ability to govern themselves." *Bellotti*, 435 U.S. at 791-92 n.31. When the states engage in partisan gerrymandering to predetermine the outcome of an election, they render meaningless the right to cast a meaningful vote.

It is difficult to identify a core individual political right that is left untainted by partisan gerrymandering. By weighting the electoral scales, it substantially burdens the rights of any citizens who would choose to "run for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a campaign, and contribute to a candidate's campaign." *McCutcheon*, 572 U.S. at 191.

Each step in the partisan gerrymandering process offends bedrock First Amendment principles protecting "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, *regardless of their political persuasion*, to cast their votes effectively." *Williams*, 393 U.S. at 30 (emphasis added). The process of enacting a partisan gerrymander reveals the punishing burdens it places on individual voters. First, the state engages in redistricting with the intent of drawing a map highly likely to favor candidates of a particular political party, regardless of voters' electoral preference. Second, it uses data on citizens' political preferences to identify voters whose views it wants to elevate and those whose views it wishes to subordinate. *See Ariz. State Leg.*, 135 S. Ct.

at 2658. Third, it allocates voters to specific legislative districts based on that data, with the goal of shielding preferred candidates from meaningful opposition. At each step of the way, the state engages in viewpoint-based discrimination to diminish the voting strength of citizens holding disfavored political views and to insulate the state's preferred party from "the political responsiveness at the heart of the democratic process." *McCutcheon*, 572 U.S. at 227.

When the state entrenches its preferred parties "to the exclusion of others" it "very effective[ly] imped[es] ... associational and speech freedoms ... essential to a meaningful system of democratic government." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 70 (1990) (quoting *Elrod*, 427 U.S. at 369-70). This Court has found a substantial burden on the freedom of association where the legislature hampered voters' ability to band together with "like-minded voters to gather in pursuit of common political ends ... [and] to express their ... political preferences." *Norman*, 502 U.S. at 288. Partisan gerrymandering is pernicious for exactly that reason. It limits "independent-minded voters [from] associat[ing] in the electoral arena to enhance their political effectiveness as a group." *Anderson*, 460 U.S. at 794.

To avoid political subordination, citizens may curtail the exercise of their political rights or change them to align more closely with the state's preferences. Citizens may be less likely to join a disfavored party, contribute to or volunteer for candidates with disfavored views, or vote at all. Partisan gerrymandering entangles government in

the "dangerous business [of] ... us[ing] the election laws to influence voters' choices," vesting in the state—instead of the voters—the ultimate judgment concerning "which strengths should be permitted to contribute to the outcome of an election." *Davis v. Fed. Election Comm'n*, 554 U.S. 724,742 (2008).

Unconstitutional partisan gerrymandering is distinct from the "inevitabl[e]" political considerations and partisan effects that follow from neutral state regulation of elections. *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). Courts cannot and should not intervene in a neutrally-administered system where "one-party rule is entrenched [because] voters approve of the positions and candidates that the party regularly puts forward." *Lopez Torres*, 552 U.S. at 208. But when a state redistricts for the purpose of granting its preferred party an entrenched advantage, it disables the competitive mechanism driving the democratic process. It substantially burdens voters' rights to participate in a fair election. *See Williams*, 393 U.S. 31-32; *see also Ariz. State Legislature*, 135 S. Ct. at 2658.

III. THE CHALLENGED PLANS IN NORTH CAROLINA AND MARYLAND WERE EACH ENACTED TO ENTRENCH THE STATE'S PREFERRED PARTY IN OFFICE AND RESULTED IN IMPERMISSIBLE ENTRENCHMENT.

The Court should adopt a burden shifting analysis, familiar from other areas of constitutional law, to determine when redistricting violates the First Amendment by intentionally and effectively entrenching the state's preferred party in office.

To start, plaintiffs must establish a prima facie case of improper partisan gerrymandering. They must show: (1) that the state acted with the intent to entrench the state's preferred political party; and (2) that it accomplished its intent. If plaintiffs establish a prima facie case, the burden shifts to the state to justify its actions. Because partisan gerrymandering directly infringes fundamental First Amendment rights, the state must meet heightened scrutiny. *See supra* Part II.

District courts are responsible for determining whether the parties have met their respective burdens. *See Hunt v. Cromartie*, 526 U.S. 541, 553-54 (1999). As with the "variety" of other "constitutional and statutory disputes" in which this Court "has embraced new social science theories and empirical analyses," the lower courts are up to the task. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 857 (M.D.N.C. 2018). The tools, methods, and metrics used to draw constitutionally suspect maps have become ever more sophisticated. These developments increase *both* the ability of state officials to rig elections, *and* that of courts to identify when they do so. *See Vieth*, 541 U.S. at 312-13 (Kennedy, J., concurring) ("[N]ew technologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties."); *see also Gill v. Whitford*, 138 S. Ct. 1916, 1941 (2018) (Kagan, J., concurring) ("[T]echnology makes today's gerrymandering altogether different from the crude linedrawing of the past.").

No single empirical test can provide the sole metric to establish partisan gerrymandering. It is the

First Amendment that defines the injury; as in other contexts, empirical analysis merely supplies evidence that a reviewing court may consider and apply.

An instructive analogy from antitrust—the law of commercial competition—can be drawn to the law of political competition. From the limited guidance provided by the antitrust statutes, federal courts developed manageable standards for determining when certain conduct harms competition, the "rule of reason," of which proof of market power is a critical component. *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283-84 (2018). "[D]etermining the existence of market power" is a flexible inquiry that requires courts to "examine[] closely the economic reality of the market at issue." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 467 & n.13 (1992). Thus, this Court has left to factfinders in antitrust cases the flexibility to consider a variety of empirical tests that may assist them in determining whether a firm has a problematic level of market power—including new methods as they become available.[7]

As in antitrust cases, the empirical analyses most probative of whether a challenged plan locks up electoral competition may vary by case and will change and improve as social science evolves. But in both areas, courts can and do routinely consider expert evidence to help determine whether a legal standard has been met—and in particular, to assess

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[7] *See, e.g., In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, No. CV 14-MD-02503, 2018 WL 563144, at *6-11 (D. Mass. Jan. 25, 2018) (discussing a variety of expert empirical analyses probative of the existence of market power in denying summary judgment and *Daubert* motions).

improper influence in a marketplace, whether electoral or commercial.

While their approaches vary in detail, all five lower federal courts to address partisan gerrymandering claims since this Court's decision in *Arizona State Legislature* have applied similar judicially manageable standards to determine whether a challenged map or district results in the kind of entrenched partisan advantage that the First Amendment proscribes.[8] In each of these decisions, courts carefully considered the full record and a range of expert evidence to assess whether the legal standard was satisfied, and to ensure that their intervention was properly limited. That approach is consistent with the entrenchment standard the Court should embrace.

A. There Is Consensus Among District Courts That the First Amendment Supplies Manageable Standards to Adjudicate Partisan Gerrymandering Claims.

Since this Court wrote in 2015 that "partisan gerrymanders ... are incompatible with democratic principles," *Ariz. State Legislature*, 135 S. Ct. at 2658 (citation and internal quotation marks and alterations omitted), all five federal district courts to

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[8] *See Ohio A. Philip Randolph Inst. v. Householder*, No. 18-cv-357, 2019 WL 652980, at *3-4 (S.D. Ohio Feb. 15, 2019) (*OAPRI*); *League of Women Voters of Mich. v. Johnson*, No. 17-cv-14148, 2018 WL 6257476, at *4, *18 (E.D. Mich. Nov. 30, 2018) (*LWV-Michigan*); *Benisek v. Lamone*, 348 F. Supp. 3d 493, 497-98 (D. Md. 2018); *Rucho*, 318 F. Supp. 3d at 838, 860-65; *Whitford v. Gill*, 218 F. Supp. 3d 837, 884, 898 (W.D. Wis. 2016), *rev'd on other grounds*, 138 S. Ct. 1916 (2018).

pass judgment have converged upon a justiciable standard to assess when an apportionment plan violates the First and Fourteenth Amendments.[9]

First, all five courts have required plaintiffs to prove that a challenged map or district was drawn with intent to entrench a partisan advantage.[10] Second, plaintiffs had to prove that the challenged map or district achieved the intended partisan advantage.[11] Third, each court also required proof that the challenged map could not be justified by legitimate, partisan-neutral principles.[12]

Notwithstanding some differences at the margins, there is a consistent recognition in the lower court decisions that a plan violates the Constitution when it uses redistricting methods that are designed to, and predictably do, deviate from the normal distribution of voter preferences to entrench the advantage of one party over another. The lower courts have all relied on expert analysis to help determine—under the totality of the circumstances—whether the challenged redistricting plan so deviated from acceptable redistricting outcomes that it could only be the product of extreme partisan opportunism.

Each lower court relied upon the same types of evidence in determining whether mapmakers sought to favor or punish a particular party to such an extent as to lock up the electoral marketplace. For example, each lower court has looked to analyses

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[9] *See* cases cited *supra* note 8.

[10] *See* cases cited *supra* note 8.

[11] *See* cases cited *supra* note 8.

[12] *See* cases cited *supra* note 8.

generated by the mapmakers to test whether and to what extent proposed maps would yield resilient partisan advantage.[13] They also relied upon expert analyses regarding the resilience of gerrymandered maps to electoral changes.[14] And they have considered the extent to which actual election results in fact rewarded mapmakers' efforts to insulate candidates of the state's preferred party from electoral accountability.[15]

These rulings are consistent with this Court's focus on entrenchment in defining impermissible partisan gerrymandering. *Ariz. State Legislature*, 135 S. Ct. at 2658; *cf. LULAC*, 548 U.S. at 419 ("[A] congressional plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority."). As the *Rucho* court observed, "by intentionally seeking to entrench a favored party in power and make it difficult—if not impossible—for candidates of parties supporting disfavored viewpoints to prevail, partisan gerrymandering 'seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.'" 318 F. Supp. 3d at

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[13] *OAPRI*, 2019 WL 652980, at *9-10; *LWV-Michigan*, 2018 WL 6257476, at *2; *Benisek*, 348 F. Supp. 3d at 503-04; *Rucho*, 318 F. Supp. 3d at 869-70; *Gill*, 218 F. Supp. 3d at 891.

[14] *OAPRI*, 2019 WL 652980, at *11; *LWV-Michigan*, 2018 WL 6257476, at *7-8; *Benisek*, 348 F. Supp. 3d at 507; *Rucho*, 318 F. Supp. 3d at 876; *Gill*, 218 F. Supp. 3d at 894.

[15] *OAPRI*, 2019 WL 652980, at *11; *LWV-Michigan*, 2018 WL 6257476, at *3; *Benisek*, 348 F. Supp. 3d at 519; *Rucho*, 318 F. Supp. 3d at 884-85, 894-95; *Gill*, 218 F. Supp. 3d at 853.

800-01 (quoting *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994)). Correspondingly, by entrenching a preferred party, the state also locks out voters who favor other candidates or parties from the political system. *See Carrington v. Rash*, 380 U.S. 89, 94 (1965) ("'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.").

The entrenchment standard proposed by amici places a heavier burden on plaintiffs alleging partisan gerrymandering claims than the standard set by some courts to consider this issue. The proof of a defendant's intent to *entrench* a partisan advantage in the proposed test requires more than mere intent to disfavor certain voters because of their voting history or partisan affiliation. *See, e.g., Benisek*, 348 F. Supp. 3d at 515. A focus on entrenchment captures the unlawful *intent* at issue in each of these cases. It assesses whether the state seeks to shield a preferred party from accountability to the electorate by diluting the voting strength of opposing parties and their members. And entrenchment also identifies the *effect* that an unlawful partisan gerrymander achieves—namely, a deviation from neutral districting principles that resists likely shifts in the electorate. So defined, the entrenchment standard aligns with, but lends greater clarity to the "tangible and concrete adverse effect" measure that some courts have employed. *See, e.g., id.* Amici's proposal builds on the way in which at least five district courts have utilized manageable standards for weighing evidence. The problem of partisan gerrymandering can and should be solved by the customary development of evidentiary law, not by dictating that any single method of proof be

sufficient for all such challenges. Precisely because an effective, invidious partisan gerrymander is a self-perpetuating problem designed to prevent correction through the political process, the courts are not only "conspicuously well situated" to correct it—they are the only ones that can do so.[16]

B. Courts Are Well-Suited and Equipped to Determine Whether the State Acted With Intent to Entrench a Partisan Advantage.

1. Courts May Determine Intent to Entrench Through Direct or Circumstantial Evidence.

Partisan gerrymandering aims "to subordinate adherents of one political party and entrench a rival party in power." *Ariz. State Legislature*, 135 S. Ct. at 2658. To make a prima facie claim, plaintiffs must therefore establish, first, that the state purposely and improperly set out to disadvantage one party and make its plan non-responsive to electoral shifts.

A state acts with an intent to entrench when it draws an apportionment plan deliberately to ensure that the partisan composition of the legislature will not be responsive to changes in voter preferences under the likely range of electoral scenarios. More than the mere *consideration* of politics, *see Vieth*, 541 U.S. at 315 (Kennedy, J., concurring), an intent to *entrench* exists where lines are drawn for the purpose of *locking in* partisan advantage regardless of the voters' likely choices. *See Ariz. State*

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[16] *OAPRI*, 2019 WL 652980, at *6-7 (quoting John Hart Ely, *Democracy and Distrust* 102-03 (1980)).

Legislature, 135 S. Ct. at 2658. Any redistricting plan drawn by a legislature will be created with knowledge of the political distribution of voters. However, a state legislature cannot draw lines with the purpose of shielding candidates of its preferred party from changes in the associational choices of the citizenry.

Courts are well-equipped to undertake this inquiry through direct or circumstantial evidence. Determining motive in the context of redistricting has never proved beyond the competence of courts. *See Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 488-89 (1997); *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Contemporaneous statements of decision-makers, for example, may serve as evidence of improper purpose. *See Cooper v. Harris*, 137 S. Ct. 1455, 1468-69, 1475 (2017). Procedural irregularities—such as exclusion of the minority party from deliberations or "excessive weight on data concerning party voting trends," *Vieth*, 541 U.S. at 322 (Stevens, J., dissenting)—may also support a finding of intent. *See Bush v. Vera*, 517 U.S. 952, 970-71 (1996) (explaining that the use of detailed racial data in the districting process supported finding of discriminatory intent).

A documented history of reliance on improper purposes can also support a finding that a similar intent played a role in present redistricting. For example, in *Miller*, the Court focused on Georgia's past interactions with the Department of Justice regarding Voting Rights Act preclearance, which made clear that race was the predominant factor in the state's redistricting. 515 U.S. at 917-18. A state's history of partisan entrenchment can thus

support a finding of intent to entrench the party favored by the present redistricting map, especially where past plan performance is known and there is evidence decisionmakers seek to repeat it.

2. Plaintiffs Below Proved That Both North Carolina and Maryland Acted with Intent to Entrench Partisan Advantage.

The records from North Carolina and Maryland establish that each challenged plan was enacted with impermissible intent to entrench the state's preferred party in the challenged districts, as well as statewide. Map proponents made little effort to conceal their intent to entrench fellow partisans in office.

North Carolina. In North Carolina, Senator Rucho and Representative Lewis, redistricting committee co-chairs, directed Dr. Hofeller, their mapmaking consultant, to ensure an overwhelming Republican advantage, regardless of changes in the partisan preferences of voters. *Rucho*, 318 F. Supp. 3d at 803-05. They made clear that their "'primary goal' was 'to create as many districts as possible in which GOP candidates would be able to successfully compete for office.'" *Id.* at 880 (quoting Hofeller Dep. 123:1-7). Hofeller received essentially all of the criteria he used to draw the challenged map from Rucho and Lewis and created a "near-final" version of the challenged plan before the redistricting committee even held its first meeting. *Id.* at 806. In designing the map, Hofeller relied on a bespoke metric to test maps based on whether Republicans could achieve a durable partisan advantage in ten districts. *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 601-02, 641 (M.D.N.C. 2018), *vacated and*

remanded for further consideration in light of Gill, 138 S. Ct. 1916, 138 S. Ct. 2679 (2018). Both Lewis and Hofeller testified that they reviewed draft plans to assess their likely durability against potential electoral swings. *Rucho*, 318 F. Supp. 3d at 870.

Republican legislators dominated the redistricting process, which lacked meaningful input from Democratic legislators or the public. *Rucho*, 318 F. Supp. 3d at 868-69. During the process, Lewis remarked that the redistricting committee should focus on preserving the 10-3 Republican advantage because "he did not believe it would be possible to draw a map with 11 Republicans and 2 Democrats." *Id.* at 808 (alterations omitted). The plan passed by party-line votes at every stage. *Id.* at 808-09.

Maryland. Democrats drafting the challenged apportionment plan at issue in *Benisek* also made clear their intent to entrench their partisan advantage in the Sixth District and thereby ensure Democratic success in all but one of the remaining districts. 348 F. Supp. 3d at 502. Governor O'Malley, the Democrat who led the redistricting process, testified that "part of our intent was to create a map that was more favorable for Democrats over the next ten years and not less favorable to them." *Id.* To that end, Maryland Democrats engaged and instructed a consultant to draw a map that "maximized 'incumbent protection' for Democrats and that changed the congressional delegation from 6 Democrats and 2 Republicans to 7 Democrats and 1 Republican." *Id.* at 502-03. Those were their only instructions. *Id.* at 503.

The process in Maryland also effectively excluded the out-party, Republicans. The Governor-

created Redistricting Advisory Committee held ostensible public hearings to solicit comment, but the real work on the plan was done by "staffers to the State's most senior Democratic leaders" working with hired mapmaking consultants. *Benisek*, 348 F. Supp. 3d at 504-05. Those mapmakers used a performance metric to evaluate whether potential plans produced a sufficiently large and durable Democratic advantage. *Id.* at 503.

C. Plaintiffs Below Proved That Both North Carolina and Maryland Achieved Their Intent to Entrench A Partisan Advantage.

In addition to an intent to entrench, plaintiffs asserting a partisan gerrymandering claim must show that the state's actions had their desired effect. Entrenchment is manifest where a challenged plan significantly deviates from the normal range of redistricting distributions to the benefit of the party controlling the process. The constitutional inquiry is not whether a map results in one-party rule or fails to achieve proportional representation, but whether the state significantly deviates from sound districting principles to "freeze[] the status quo ... [against] the potential fluidity of American political life." *Jenness*, 403 U.S. at 439.

1. Entrenchment Can Be Assessed Through Discernible Deviations in Normal Ranges of Partisan Balance.

A state presumptively violates the First Amendment when an intent to entrench incumbent political advantage dominates its redistricting

process, and when the resulting districting plan succeeds in that entrenchment. Maps that materially deviate from normal districting principles and ensure incumbent advantage against the range of likely political swings in the electorate impermissibly entrench partisan advantage. Evidentiary proof of the dominant partisan intent and the resulting departure from normal districting practices then shifts the burden of production to the state to justify the challenged plan as necessary to legitimate state ends.

As the orders under review and other recent decisions show,[17] there are numerous methods of identifying suspect departures from neutrality. One method that has gained acceptance among social scientists and the lower courts is to compare the challenged plan against hypothetical maps generated using neutral redistricting criteria (e.g., equipopulation, nondiscrimination requirements, compactness, and contiguity). Experts can identify whether and to what extent a challenged map evinces entrenchment effects by (1) generating a large set of hypothetical maps based on established neutral criteria; (2) identifying the median in the distribution of hypothetical maps; and (3) determining whether the challenged map produces a partisan balance that deviates significantly from that median to the advantage of the state's preferred party.[18] Several lower courts[19] (including *Rucho* as

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[17] *See, e.g.*, *OAPRI*, 2019 WL 652980, at *9-14; *LWV-Michigan*, 2018 WL 6257476, at *7-9; *Gill*, 218 F. Supp. 3d at 898-906.

[18] *See* Jowei Chen & Jonathan Rodden, *Cutting Through the Thicket: Redistricting Simulations and the Detection of Partisan Gerrymanders*, 14 Election L.J. 312, 332 (2015) ("If the parti-

discussed *infra*) have considered this method among several others for comparing a challenged plan's partisan balance to a neutral baseline.

Under the entrenchment benchmark, the First Amendment only bars plans that yield the state's preferred outcome by deviating materially from expected possible distributions of electoral outcomes, as demonstrated by a variety of evidentiary tests, and always accruing to the benefit of the party in power. Thus, the inquiry would protect against imbalances that "compromis[e] the political responsiveness at the heart of the democratic process," *McCutcheon*, 572 U.S. at 227, while allowing other redistricting outcomes that reasonably reflect a state's partisan balance.

Such a standard mirrors those that courts apply to pattern-or-practice discrimination claims under the civil rights laws. *See Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307 (1977); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977). Title VII cases, for example, call on courts to identify a baseline for the relevant workforce in a given geographic market against which to measure the composition of an employer's

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sanship of a proposed plan lies in the extreme tail of the distribution of simulated plans or outside the distribution altogether, courts can make relatively strong inferences about the plan's partisan effect and intent."); *see also* Wendy K. Tam Cho & Yan Y. Liu, *Toward a Talismanic Redistricting Tool: A Computational Method for Identifying Extreme Redistricting Plans*, 15 Election L.J. 351, 360, 362-64 (2016) (positing comparison of challenged map against distribution of millions of alternative maps).

[19] *OAPRI*, 2019 WL 652980, at *11, *16-17; *LWV-Michigan*, 2018 WL 6257476, at *7-8.

workforce. *See Hazelwood*, 433 U.S. at 307; *see also id.* at 311-12. As in Title VII cases, courts presiding over gerrymandering cases may then determine whether available evidence demonstrates an entrenched "gross disparity" between the settled baseline and the challenged system. *Id.* at 307-08.

In both partisan gerrymandering and pattern-or-practice cases, the law does not guarantee proportionality. *See LULAC*, 548 U.S. at 419; *Hazelwood*, 433 U.S. at 307. But in both types of cases, evidence of "gross statistical disparities" between the challenged conduct and neutral conditions can constitute prima facie evidence of intent and effect. *Hazelwood*, 433 U.S. at 307-08; *cf. Gomillion v. Lightfoot*, 364 U.S. 339, 347-48 (1960) (holding that evidence of stark impact of facially neutral law may be determinative of intent and effect).

A state's intentional entrenchment of its favored party on viewpoint-based grounds violates the First Amendment whether it has effect in a single election, or continues over time. The constitutional harm accrues at the moment the state breaches its duty to neutrally act. After-the-fact evidence of multiple electoral outcomes is not necessary to establish improper entrenchment. Plaintiffs can and must be able to immediately challenge a state's use of sophisticated technology to generate maps that lock out opponents of the state's preferred party from meaningful participation in the democratic process. If injured voters are required to wait until even a single election—let alone multiple elections—has passed before bringing a challenge, officials elected under an unconstitutional map gain

illegitimate "advantages of incumbency." *Shelby Cty. v. Holder*, 572 U.S. 529, 572 (2013) (Ginsburg, J., dissenting). Even worse, those officials would have an incentive to drag out already protracted litigation to prolong their tenures. With manageable metrics now available, courts have a constitutional obligation to permit voters to act quickly to preserve the integrity of elections and their First Amendment rights.

2. *Both North Carolina and Maryland Effectively Entrenched a Partisan Preference.*

The courts below correctly found that apportionment plans in both North Carolina and Maryland had the effect of entrenching each state's preferred party in office.

North Carolina. The district court found that North Carolina effectively entrenched a Republican majority. That finding is well-supported by actual election results as well as the testimony of three expert witnesses employing six established methods for analyzing the challenged map using current and historic election results. Moreover, the district court's finding of diminished political activity—including in fundraising, attracting candidates, and turning out voters—by Democrats reinforce the finding of an entrenchment effect. *Rucho*, 279 F. Supp. 3d at 679-80.

First, the November 2016 election, the only election to take place under the challenged plan at that time, confirmed that the state achieved its goal of electing ten Republicans to Congress, despite winning only 53% of the vote for congressional

candidates. *Id.* at 657. The district court's findings are also supported by the results of the two elections held under the 2011 plan, which yielded a grossly disproportionate Republican advantage, and led Lewis and Rucho to instruct Hofeller to make preserving that advantage the goal of the 2016 map. *Id.* at 667.

Second, the district court found that sensitivity testing performed by plaintiffs' expert demonstrated that under the challenged map in the 2016 election, even if "Democrats obtained a statewide, uniform swing of even six points—taking [the] Democratic share of the two-party vote to 52.7%—*no seats would change hands relative to the actual 2016 results*," i.e., Democrats still would have won only three seats. *Id.* at 658 (internal quotation marks omitted).

Third, the district court's finding of entrenchment was supported by three expert analyses of partisan asymmetry, each showing a significant advantage for Republicans over Democrats in terms of their ability to translate votes into Congressional seats. *See id.* at 661 (efficiency gap); *id.* at 664-65 (partisan bias); *id.* at 665-66 (mean-median analysis). Each analysis compared the challenged plan against national and/or historical state benchmarks, and showed that the North Carolina map exhibited an extreme bias in favor of Republicans.

Finally, two experts—Drs. Mattingly and Chen— each used different methods to compare the challenged plan against thousands of hypothetical maps generated using partisan-neutral criteria, revealing an entrenchment effect so extreme that it

could be explained only by intent to secure partisan advantage. Each expert tested hypothetical maps with actual election data to determine how many maps drawn with politically neutral criteria could achieve the same partisan composition of the North Carolina congressional delegation as the challenged map, i.e., a 10-3 Republican advantage. Mattingly found that 99% of 24,518 simulated maps would have led to the election of fewer Republicans than the challenged map and that even slight changes to the challenged map would yield significant changes in the partisan composition of North Carolina's congressional delegation. *Id.* at 643-45. In comparing the challenged plan to three sets of 1,000 hypothetical maps—each set drawn with partisan-neutral criteria purportedly used to draw the challenged map—Chen found not a single map resulting in the achieved 10-3 Republican advantage. Instead, 94.5% of the simulated plans would have yielded between two and four fewer Republicans than the challenged map; and most maps would have yielded either 6 or 7 Republicans. *Id.* at 646, 666-67. Both Mattingly and Chen concluded that the challenged map was an extreme outlier that had an adverse effect on supporters of non-Republican candidates, and that such an outcome could only be explained by the object of partisan entrenchment. *See id.* at 644, 646, 667, 669-70.

Altogether six analyses from three experts supported the same conclusion—one confirmed by the results of the 2016 election. The challenged map entrenched Republicans in power against even significant swings in favor of Democrats, exactly the stated objective of the incumbents in charge of the process.

Maryland. The district court's findings make clear that the challenged map was highly likely to achieve the effect intended by its Democratic sponsors—a finding further confirmed by actual election results from three cycles.

The district court relied upon two measures of impermissible effect generated prior to an election being held under the challenged plan. The first, the Partisan Voter Index (PVI), is a "well-respected" measurement of a congressional district's likely partisan performance published by the Cook Political Report, an independent non-partisan newsletter. *Benisek*, 348 F. Supp. 3d at 507. As a result of 2011 redistricting, the Sixth District's PVI changed from a "Solid Republican" rating to "Likely Democratic" before the 2012 election. *Id.* Academic research shows that Republicans win districts with a "Solid Republican" rating 99.7% of the time and Democrats win districts with a "Likely Democratic" rating 94% of the time. *Id.*

The district court also relied upon the Democratic Performance Index (DPI), the proprietary measure of partisan performance used by the Democrats' redistricting consultant, NCEC Services, Inc., to conclude that the challenged plan left Republicans in the new Sixth District with "no real chance" of electing their preferred candidate. *Id.* at 503, 519. NCEC's data showed that in the 2016 election, Democrats "almost never won districts with a DPI below 50%, but won 92.5% of districts where the DPI was above 50%." *Id.* at 503. The challenged map changed the Sixth District from a DPI under 40% to 53%. *Id.* at 507.

The significant net increase of Democrats in the new Sixth District also demonstrates an entrenchment effect. *Id.* at 519. The challenged apportionment had the effect of changing the ratio of registered Republicans to Democrats from 1.3:1 to "nearly the exact inverse" in the Sixth District, providing an advantage that the DPI and PVI both showed was highly likely to be insurmountable for Republicans. *Id.*

The *Benisek* court properly stressed that under the standard it applied, plaintiffs "need not show that the linedrawing altered the outcome of an election" or that the challenged district "was *certain*" to deny them the opportunity to elect their candidate of choice. *Id.* Nonetheless, that the Democratic candidate won the challenged district in each of the three election cycles following the challenged apportionment confirms Democrats did not merely gain an opportunity to compete in the Sixth District, but insulated the Democratic candidate from accountability to voters. *Id.* at 519-20. Further findings that Republicans showed lower turnout, diminished fundraising, and voter disaffection also support the finding of partisan entrenchment. *Id.* at 523-24. Once again, intent and effects converge to create a willfully distortive political map.

In both cases before this Court, the quantity, variety, and consistency of the evidence supporting the district courts' findings of discriminatory effect are sufficient to satisfy any standard, particularly when coupled with the overwhelming evidence of overt intent to achieve just this goal. No party below, in either case, could make any claim that this was

not the precise aim of the redistricting process under challenge.

D. After a Prima Facie Showing, the Burden Shifts to the State to Demonstrate That Its Plan Was Necessary to Meet Legitimate Interests.

Once plaintiffs make a prima facie case of partisan entrenchment, the burden must shift to the state to establish that its redistricting plan was necessary to meet legitimate state interests. *See Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979) ("[A] State may not choose means that unnecessarily restrict constitutionally protected liberty." (quoting *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973))); *see also Vieth*, 541 U.S. at 307 (Kennedy, J., concurring) (explaining that partisan gerrymandering may violate the Constitution when political classifications are "applied in an invidious manner or in a way unrelated to any legitimate legislative objective"). This Court has identified various such interests, including "traditional districting principles such as compactness and contiguity," "maintaining the integrity of political subdivisions," or maintaining "the competitive balance among political parties." *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1306 (2016) (internal quotation marks and alterations omitted).

Once it asserts that it pursued legitimate interests, the state must prove that the map it drew was necessary to satisfy them. "[I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State

may not choose the way of greater interference." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *see also Lubin v. Panish*, 415 U.S. 709, 716 (1974). The state must show that other maps could not have met its legitimate interests.

The record is clear that neither challenged apportionment is necessary to advance the purportedly legitimate purposes claimed by either state.

North Carolina. Both Chen's and Mattingly's analyses demonstrate that the challenged map is such an extreme statistical outlier that its effects cannot possibly be explained by the pursuit of interests other than the entrenchment of partisan advantage. *Id.* at 670-71. Furthermore, the state's claim that Democrats were naturally "packed" into certain areas of the state was undermined by their own expert witness, who testified that the challenged map split several densely Democratic areas. *Rucho*, 279 F. Supp. 3d at 669-70. The district court properly rejected the state's attempts at justification.

Maryland. The state's proffered justifications strain credulity given direct evidence of intent to install a Democrat in the new Sixth District. Even if it were necessary to move the eastern boundary of the new Sixth District to keep the new First District from crossing the Chesapeake Bay, there is no reason that this change would coincide with a massive net influx of tens of thousands of Democrats at the same time that state Democratic leaders expressly called for a redistricting plan that brings the district under Democratic control. *See* Section III.B.2 *supra*. The district court's finding that the state's justifications

for the challenged district were implausible are well-supported and entitled to deference.

CONCLUSION

For the foregoing reasons, the judgments of the district courts should be affirmed.

Respectfully submitted,

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